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**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL A. GIBSON,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 48A02-0601-CR-35

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0503-FA-73

December 5, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Michael Gibson appeals from his convictions and sentences for attempted murder and prisoner possession of a dangerous device. He brings several arguments before this Court: (1) that the trial court abused its discretion when it denied his motion to exclude evidence; (2) that his separate convictions for these two crimes violate the principles of double jeopardy; and (3) that the trial court abused its discretion when it ran his sentences consecutively. Holding as we did in the companion case of Gibson's co-defendant, *Ketchem v. State*, No. 48A05-0512-CR-743 (Ind. Ct. App. Dec. 5, 2006), we find no error either at trial or sentencing, and we affirm the trial court.

Facts and Procedural History

In 2005, Defendant Michael Gibson was serving a fifty-year sentence with the Indiana Department of Correction for his convictions on charges of attempted murder, conspiracy to commit murder, and burglary with serious bodily injury. Gibson and inmates David Sidener, Scott Simmons, and Joshua Ketchem were incarcerated in the same range of cells at the Pendleton Correctional Facility. Sidener had previously written a letter to prisoner officials indicating that he had information regarding the stabbing of a prison guard. The persons involved in the stabbing were friends of Gibson, and in August 2004, Gibson informed Sidener that he knew of the letter.

On March 5, 2005, Sidener came to Gibson's cell and asked him to go to the prison's "recreation pad" facility with him. The pair, along with Simmons and Ketchem, were admitted to the recreation pad by a prison guard. Sidener immediately walked to a telephone in the area and placed a call. While Sidener was on the phone, Gibson told

Simmons, in Ketchem's presence, that Sidener had "snitched on some of his affiliated brothers," and "I'm gonna take him [Sidener] out." Tr. p. 441, 443. Simmons saw that Ketchem had a double-edged "shank" in his pants.

Several minutes later, Ketchem approached Sidener, who was still on the telephone. Ketchem kicked Sidener in the eye and began stabbing him. Gibson also began stabbing Sidener with another weapon. Gibson told Sidener, "[Y]ou're gonna die you Jewish bi***." *Id.* at 174. Sidener, who was now bleeding onto the floor, screamed and attempted to fend off the attack. This alerted Correctional Officer Harvey Pollard to the attack. He witnessed both Gibson and Ketchem on top of Sidener, and he at first thought they were hitting him. He soon noticed blood, however, and realized Sidener was being stabbed. Officer Pollard radioed for assistance, then went to the recreation pad's gated entrance and ordered the men to stop. Ketchem then backed away from Sidener, but Gibson continued attacking him. Officer Pollard sprayed Gibson with a chemical agent through the gate, at which point Gibson backed away and Officer Pollard saw that he had a knife in his hand.

Another officer on the scene radioed other officers that there was a disturbance involving a weapon. Gibson then returned to Sidener and stabbed him in the chest an additional five or six times. During this period, officers were attempting to gain entry to the recreation pad, but Ketchem was holding the gate shut against them. Officer Pollard sprayed Ketchem with the chemical agent, and when Ketchem backed away, officers entered the area and removed Sidener, who was taken to the hospital. The officers ordered Ketchem and Gibson to drop their weapons, at which point Gibson removed his

knife, which had been attached to his hand by either a piece of cloth or a lanyard, and then threw it down. Ketchem threw down his knife as well, but he claimed that Sidener had actually pulled that knife on him and Gibson and that he only acquired it after getting it away from Sidener. Officers observed that neither Ketchem nor Gibson was wounded.

Sidener's wounds included multiple stab wounds to the chest, right hand, and left leg. While none of the wounds proved fatal, several of them, particularly two wounds to the lower chest, were near vital organs and could have been fatal.

After Ketchem and Gibson were moved to holding cells, Officer Pollard overheard them laughing about the incident. Ketchem also yelled to another inmate, Kenneth Munson, that if he had been at the scene with them, "we would have killed you." *Id.* at 278. Ketchem also stated, "[W]e tried to kill that bi***, you should heard that bi*** screaming, shoulda heard him screaming like a baby" *Id.* at 293. When Munson began arguing with Ketchem, Gibson yelled, "if it was you, you'd be dead. As soon as we get to you, you're dead, you're next bi***." *Id.* Another inmate, Gerry Deckor, also overheard Ketchem talking about the attack, and he heard Ketchem say "we finally got that bi***." *Id.* at 329. Ketchem also threatened Officer Pollard, telling him not to repeat what he overheard.

On March 16, 2005, the State charged Gibson with Count I: Attempted Aggravated Battery, a Class B felony,¹ County II: Attempted Murder, a Class A felony,²

¹ Ind. Code § 35-42-2-1.5; Ind. Code § 35-41-5-1.

² Ind. Code § 35-42-1-1(2); I.C. § 35-41-5-1.

Count III: Prisoner Possession of a Dangerous Device or Material, a Class B felony;³ and Count IV: Habitual Offender.⁴ A joint jury trial for Gibson and Ketchem, who was similarly charged, was scheduled for November 7, 2005, and the State filed its Notice of Anticipated State's Witnesses on October 25, 2005. The filing stated that Simmons had written a letter indicating that he was an eyewitness to the stabbing and that he would be willing to testify against Gibson and Ketchem in exchange for favorable treatment in his own proceeding for modification of his sentence in another court. At a pretrial hearing on October 31, 2005, counsel for co-defendants Gibson and Ketchem confirmed that he had received a copy of the letter approximately two weeks earlier. However, defense counsel did not attempt to depose Simmons until November 4, 2005, and Simmons refused to cooperate at that time.

Defense counsel deposed Investigator Mike Rains, who had been at the scene of the attack, on November 4, 2005. At that time, Rains provided counsel for both sides with a sixty-seven-page report he had prepared following the attack. As it turns out, only twenty-one pages of the report had been previously provided, while the Indiana State Police had inadvertently retained the other forty-six pages. In the full report, Rains indicated that inmate Simmons was an eyewitness to the attack and that inmates Munson and Deckor had given statements concerning what they overheard when in holding cells near Gibson and Ketchem. On the first day of trial, defense counsel filed a motion to exclude Simmons' testimony, arguing that both parties had originally determined his testimony to be self-serving and of little value and noting that Simmons refused to be

³ Ind. Code § 35-44-3-9.5(1).

⁴ Ind. Code § 35-50-2-8(a).

deposed on November 4, 2005. The motion also sought to exclude any testimony by Munson or Deckor and any evidence relating to their testimony, arguing that because the Indiana State Police had failed to turn the report over to the parties before Rains' deposition, the report should be considered as evidence withheld by the State. The trial court denied the motion to exclude on all grounds but did provide defense counsel with the opportunity to depose the witnesses before they testified, which defense counsel did.

On November 10, 2005, the jury returned a verdict finding Gibson guilty of attempted aggravated battery, attempted murder, and prisoner possession of a dangerous device.⁵ The prosecution subsequently dismissed the habitual offender charge, and at sentencing, the trial court merged Count I into Count II and sentenced Gibson to fifty years on Count II and fifteen years on Count III, to run consecutively, for an aggregate sentence of sixty-five years. Gibson now appeals his convictions and sentences.

Discussion and Decision

Gibson raises three issues on appeal, which we rephrase and reorder as follows. He first contends that the trial court abused its discretion when it denied his motion to exclude evidence relating to the testimony of inmates Simmons, Munson, and Deckor. Second, he alleges that the trial court abused its discretion when it ordered his sentences to run consecutively. Last, he contends that his convictions for attempted murder and for prisoner possessing a dangerous device or material are in violation of the principles of double jeopardy and so should have been merged by the trial court. Gibson's first two arguments present the same issues on appeal as we addressed in the companion case of

⁵ Ketchem was also convicted of all charges, and he appealed on similar grounds. We address his appeal in a companion case also issued today. *See Ketchem v. State*, No. 48A05-0512-CR-743 (Ind. Ct. App. Dec. 5, 2006).

Ketchem v. State, No. 48A05-0512-CR-743 (Ind. Ct. App. Dec. 5, 2006). For the reasons we set forth in that opinion, we conclude that the trial court acted within its discretion when it denied Gibson's motion to exclude evidence and when it ordered his sentences to run consecutively.

Regarding Gibson's double jeopardy claim, we find that while the analysis set forth in *Ketchem* applies equally to Gibson's claim, it is necessary for us to briefly discuss certain specific facts of the case as they differ slightly from those in *Ketchem*. In *Ketchem*, we found no violation of double jeopardy due to the fact that Ketchem was "in possession of a knife presumably during the walk to the prison's recreation pad and certainly several minutes before the attack when Simmons saw Ketchem with the knife." Slip op. at 13. Similarly, we find no violation in Gibson's case. The evidence indicates that the knife with which Gibson attacked Sidener was attached to his arm by a strip of cloth or a lanyard, and Gibson continued to hold the knife after the attack ended and until the weapons response team arrived. Even then, it took several moments for him to unwrap and remove the knife from his arm after he was ordered to drop it. As we said in *Ketchem*, carrying the knife in the prison was one crime and using it was another.

Affirmed.

BAKER, J., and CRONE, J., concur.